Supreme Court, U. S.
FILED
MAY 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1622

SYLVESTER HIGHSAW,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE L. SENDAK
Attorney General of Indiana

ALEMBERT W. BRAYTON
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6420

Attorneys for Respondent

C. E. Pauley & Co., Inc., Indianapolis

INDEX

	Page
CITATIONS	ii
QUESTION PRESENTED	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING WRIT	3
CONCLUSION	6

CITATIONS

	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	3
Carroll v. United States, 267 U.S. 132 (1925)	3
Chambers v. Maroney, 399 U.S. 42 (1970)	3
Cooper v. California, 386 U.S. 58 (1967)	3, 4
Delaware v. Prouse, 99 S.Ct. 1391 (1979)	5
Elliott v. State, 262 Ind. 413, 317 N.E.2d 173 (1974)	5
Guardiola v. State, Ind., 375 N.E.2d 1105 (1978)	4
Harris v. United States, 390 U.S. 234 (1968)	3, 4
Sibron v. New York, 392 U.S. 64 (1968)	5
South Dakota v. Opperman, 428 U.S. 364 (1976)	4, 6
Stone v. Powell, 428 U.S. 467 (1976)	6
Terry v. Ohio, 392 U.S. 24 (1968)	5
United States v. Janis, 428 U.S. 433 (1976)	6
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1622

SYLVESTER HIGHSAW,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the Court erred in admitting heroin discovered by a police officer holding search warrants for heroin at residences under control of Petitioner after Petitioner was stopped in an automobile as he departed from one of those residences?

JURISDICTION

Petitioner claims to have invoked the Fourth and Fourteenth Amendments to the Constitution of the United States. However, he fails to show that he invoked or specially set up the rights, privileges, or immunities which he

herein presents to the trial court. Therefore, there is no jurisdiction for this Court to grant certiorari. See A-1. 28 USC § 1257(3).

STATEMENT OF THE CASE

On March 21, 1977, Officer N. W. Matthews, had information from a reliable informant, whose previous information had resulted in at least two arrests and seizures of heroin, that such informant had personally observed heroin used and sold at residences under the control of Sylvester Highsaw N/M AKA Satan at both 3326 North Ruckle Avenue and 4123 North Carrollton Avenue, Indianapolis, Marion County, Indiana, each within the preceding three days. He filed two affidavits to that effect in the Marion Municipal Court, and thereby procured a search warrant for each of the two stated residences (Petition A11-23).

On March 22, 1977, as Officer Matthews approached the 4123 Carrollton Avenue residence from the south, he observed Petitioner departing that residence and driving an automobile, and stopped Petitioner in the 4000 block of North Carrollton Avenue and advised him that he had a search warrant for that address and for Petitioner. Matthews immediately observed that Petitioner had his hand balled up into a fist and was starting to lower his clenched fist. Matthews thereupon ordered Petitioner to keep his hand where it was and to open it. Petitioner complied, thereby revealing to Matthews the heroin which was thereupon seized. Petitioner's possession of that heroin is the basis for the charge (Petition A24-27).

Petitioner fails to show that he presented any constitutional grounds, or those grounds sought to be presented in his Petition, as his objection to the admission of the heroin (Petition A29-30).

Petitioner was found guilty by a jury of possession of heroin and sentenced to fifteen years imprisonment.

The Supreme Court of Indiana affirmed the conviction. 381 N.E.2d 470 (1978). (Petition A1-6).

REASONS FOR DENYING WRIT

Petitioner's Motion to Quash the Search Warrants and his objections to the admission of the heroin into evidence at his trial show that he failed to present to the trial court the Constitutional question which is necessary to invoke this Court's jurisdiction and to justify the writ. His motion to quash shows no constitutional grounds and at most challenges only the validity of the search warrants and not the reasonableness of stopping Petitioner's automobile and the ensuing seizure of the heroin discovered on Petitioner's person. Petitioner's objection to the admission of the heroin at the trial likewise failed to present the issue sought as the basis for the writ.

Had Petitioner presented the issue, his contention is without merit. Different standards must necessarily apply to the review of searches and seizures with respect to vehicles from those with respect to dwellings. A search warrant is not required for the stopping of an automobile where the stopping is reasonable. *Chambers v. Maroney,* 399 U.S. 42, 47-48 (1970); *Carroll v. United States,* 267 U.S. 132 (1925); *Harris v. United States,* 390 U.S. 234, 236 (1968); *Cooper v. California,* 368 U.S. 58, 62 (1967).

Thus, even had the search warrants been defective, Petitioner's pre-trial motion to quash the warrants would not have justified the suppression of the heroin. But Petitioner argues even here that the search warrants failed to comply with the requirements of *Aguilar v. Texas,* 378 U.S. 108 (1964), yet ambiguously states that, "Petitioner has never

challenged the validity of these search warrants as they applied to the two dwellings." (Petition, page 7). In admitting that the search warrants were valid, Petitioner fails to show that the trial court erred in denying his motion to quash.

Even if the search warrants had been invalid, the heroin found on Petitioner's person would have been subject to suppression only if Officer Matthews had exceeded his authority in the circumstances. Petitioner's motion to quash the warrants failed to make the reasonableness of the stop an issue and failed to present any objections based on the Fourth and Fourteenth Amendments to the Constitution of the United States. Had Petitioner done so, Officer Matthews had knowledge of Petitioner's recent activity in the drug field, the same knowledge which was incorporated into his affidavits for the search warrant (Petition A11-13, 18-20), which gave him reasonable cause to stop the Petitioner and to investigate. He had an additional reason, as he saw Petitioner leave the Carrollton Avenue address, to stop the car and to serve the warrant upon Petitioner. In any event, he had sufficient cause to stop the car of the person whom he recognized as the person whose residence he was approaching with the purpose of serving a search warrant for the possession of heroin. *South Dakota v. Opperman,* 428 U.S. 364, 367-368 (1976); *Cooper v. California, supra; Guardiola v. State,* Ind., 375 N.E.2d 1105, 1110 (1978).

Upon being stopped, Petitioner clenched his hand into a ball and brought it down. Thereupon, Officer Matthews, for his own protection, was fully entitled to demand that Petitioner open his hand, whereupon he saw the contraband heroin in his plain view. *Harris v. United States, supra;*

Terry v. Ohio, 392 U.S. 24, 27 (1968); *Elliott v. State,* 262 Ind. 413, 414-416, 317 N.E.2d 173, 175-176 (1974).

The facts known to Matthews were articulable and in fact had been articulated into the affidavits which he had filed for the search warrants, and thus established probable cause for his stopping Petitioner. *United States v. Martinez-Fuerte,* 428 U.S. 543, 561 (1976). Officer Matthews had reasonable ground for an individualized suspicion of Petitioner. Petitioner errs in equating his case to *Sibron v. New York,* 392 U.S. 64 (1968), wherein the officer was not acquainted with Gibson and had no information concerning him. Also, this case bears no resemblance to Petitioner's case of *Delaware v. Prouse* — U.S. —, 99 S.Ct. 1391 (1979), which involved a random spot check for possible violations of operator license and registration requirements. In *Prouse,* this Court expressly separated the random spot check from situations in which there is, "an articulable and reasonable suspicion," that the vehicle or an occupant is subject to seizure for violation of law. That distinction is manifest in the particular circumstances of the case at bar.

The reasoning of all of the above cases makes it clear that the situation in this case, wherein search warrants had already been obtained, justify the stopping of Petitioner as he departed one of the residences which the officer was approaching to search pursuant to a search warrant. The mobile nature of the automobile, its likely use in transporting away and disposing of the very contraband authorized by the warrant to be sought in the search, and the negligible chance of preventing such transportation and disposal by obtaining an additional warrant for the search of the particular automobile, are practical factors which Respondent believes cannot be ignored.

Contrary to Petitioner's contention, the Supreme Court of Indiana did not cavalierly ignore the Fourth and Fourteenth Amendments in this case. Instead, it addressed itself to Petitioner's contention and properly held that, in the circumstances, Officer Matthews was justified in stopping Petitioner's automobile and seizing the heroin which he immediately displayed. It is submitted that Petitioner's contention was duly considered and that the correct decision was reached under the guideline of *South Dakota v. Opperman, supra,* and the other authorities cited herein.

It may also be suggested that this Court has properly hesitated in recent decisions to extend the exclusionary rules, correctly fearing that such rules burden good faith police efforts with excessive deterrents. *United States v. Janis,* 428 U.S. 433 (1976), *pet. for reh. denied* 429 U.S. 874 (1976); *Stone v. Powell,* 428 U.S. 467 (1976).

CONCLUSION

For the foregoing reasons, Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

ALEMBERT W. BRAYTON
Deputy Attorney General

Attorneys for Respondent

APPENDIX

IN THE

CRIMINAL COURT OF MARION COUNTY

DIVISION THREE

STATE OF INDIANA
COUNTY OF MARION } SS:

STATE OF INDIANA,
vs.
SYLVESTER HIGHSAW

Honorable Andrew Jacobs, Sr.
Presiding
Cause No. Cr77-134C

MOTION TO QUASH SEARCH WARRANT
[a copy has been served]

Now comes the Defendant by his undersigned attorney and respectfully moves this honorable Court to quash the search warrants heretofore issued and served upon him on the 22nd day of March, 1977 at the street of N. Carrollton Avenue in Indianapolis, Indiana and in support thereof he assigns the following grounds and reasons:

1. That there is a fatal variance between the affidavit heretofore made by N. W. Matthews on the 21st day of March, 1977 before the Honorable Judge Patrick Barton which was the predicate for the issuance of the search warrant which is the subject matter of this motion. That the affidavit makes positive allegations purportedly establishing probable cause. That the controlled substances laws of the State of Indiana were violated; that the officers have admitted in deposition heretofore filed before this Court, that their search of the defendant allegedly leading to the discovery of narcotic substances was made pursuant to the

authority vested in them by this search warrant for the person of the defendant. It is a fact, however, that the search warrant does not contain a command to search the person of the defendant which constitutes a fatal variance and subjects any seized substances to being suppressed.

2. That there is a fatal variance between the conclusions drawn in the affidavit and the probable cause contained therein to support said conclusion.

3. That the affidavit is without probable cause to support their inference that any controlled substances were on the person of the defendant.

4. That the search warrant for Sylvester Highsaw uses an alias of "Satan" which alias was included in the affidavit and search warrant in order to prejudice the rights of the defendant in bringing before a jury the substance of the affidavit and search warrant. Further, that the use of such a fictitious name is fundamentally unfair in view of the obvious purjorative connotations of that word.

5. That on March 21, 1977, police officers of the City of Indianapolis and the Marion County Prosecutor's Office caused to be issued two search warrants, first for 3326 N. Ruckle Avenue and the second for 4123 N. Carrollton Avenue both in Marion County and the State of Indiana. That in addition, the officers requested in their respective affidavits that the search include the person of Sylvester Highsaw and the person of N/F, name unknown and for any evidence of the conspiracy to violate the Indiana Controlled Substances Act. That under the law, these acts constitute the issuance of a general search warrant which is prohibited under the law of the United States of America.

6. That the probable cause contained in both affidavits is without sufficiency to include a search of the defendant's person and of any N/F, name unknown, of any conspiracy.

7. That the search of the defendant was based solely upon the authority of this search warrant.

WHEREFORE, we respectfully request that the search warrant and any evidence obtained therefrom be suppressed and that said search warrant is, and ruled thereby to be invalid.

s/ CHRISTOPHER C. ZOELLER
Attorney for Defendant

Christopher C. Zoeller
1135 Market Square Ctr.
Indpls., IN 46204
632-4665